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No. 98-107

In the Supreme Court of the United States

OCTOBER TERM, 1998

R.M. SMITH,
PETITIONER,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner failed to state a claim for relief under the antitrust laws when she alleged that a bylaw of the National Collegiate Athletic Association prevented her from competing in intercollegiate athletics after she graduated from college.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. The National Collegiate Athletic Association does not have any parent companies or non-wholly-owned subsidiaries.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The petition does not present any basis for this Court to review the Third Circuit's routine application of settled antitrust law to the complaint in this case. The court of appeals held that petitioner's complaint did not state a claim under the antitrust laws for *two* reasons: (1) student-athlete eligibility rules that relate solely to enrollment status rather than to economic factors do not constitute restraints of trade within the meaning of the antitrust laws; and (2) even if the rules were accorded antitrust scrutiny, the allegations in petitioner's complaint would not make out a violation of the antitrust laws under the rule of reason. The petition does not come to grips with the Third Circuit's straightforward rule-of-reason analysis that weighed petitioner's complaint and found it wanting. That analysis disposes of this case, so that a grant of certiorari on the questions posed by the petition could not affect the judgment.

STATEMENT

1. Respondent National Collegiate Athletic Association (NCAA) is an unincorporated, nonprofit association of more than 1100 colleges, universities, and athletic conferences engaged in intercollegiate athletic competition. This Court has recognized the NCAA's "critical role in the maintenance of a

revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 120 (1984). In carrying out that function, the NCAA adopts and enforces bylaws and other rules governing such matters as the conduct of athletic events, the recruitment and eligibility of student-athletes, and academic standards. See *id.* at 101-102.

NCAA bylaws generally restrict participation in intercollegiate athletics to full-time undergraduate students, who may compete during four athletic seasons within a five-year period. Pet. App. 3a n.1. Student-athletes who graduate from college before exhausting their eligibility may compete for their undergraduate institution if they are enrolled in graduate school there. Until August 1996, NCAA Bylaw 14.1.8 ("Postbaccalaureate Bylaw" or "Bylaw") prohibited a student-athlete from participating in intercollegiate athletics for a postgraduate institution other than her undergraduate school. *Id.* at 5a n.2.

Petitioner entered St. Bonaventure University in fall 1991 and played intercollegiate volleyball during the 1991-92 and 1992-93 seasons. Pet. App. 4a. She chose not to compete during the 1993-94 season, and graduated halfway through that academic year. *Ibid.* St. Bonaventure did not offer the courses of postgraduate study that interested petitioner. *Id.* at 4a-5a. Accordingly, she enrolled in a postgraduate program at Hofstra University in fall 1994 and the next year enrolled in another postgraduate program at the University of Pittsburgh. *Ibid.*

Because of the Postbaccalaureate Bylaw, petitioner was not eligible to play intercollegiate volleyball for Hofstra or Pittsburgh. Pet. App. 5a-6a. Although both schools asked the NCAA to waive the Bylaw for petitioner's benefit, the NCAA declined. *Id.* at 5a. In January 1996, however, the NCAA amended the Bylaw to broaden the eligibility of graduate students who enrolled at institutions other than their undergraduate schools. See Pet. 12, 29. The new Bylaw applies to enrollments after August 1, 1996. Pet. App. 87a. Petitioner does not

state whether she asked the NCAA to waive the five-year rule so that she could take advantage of the amended Bylaw.

2. In August 1996, petitioner filed this action in the United States District Court for the Western District of Pennsylvania. Pertinent here is petitioner's claim that the Postbaccalaureate Bylaw unreasonably restrained trade in violation of Section 1 of the Sherman Act. See Pet. App. 6a. Petitioner also asserted a claim of sex discrimination under Title IX, 20 U.S.C. § 1681, and a contract claim.

The district court dismissed the case for failure to state a claim on which relief could be granted. Pet. App. 36a. See Fed. R. Civ. P. 12(b)(6). In particular, the district court held that the Sherman Act did not apply to NCAA athletic eligibility rules such as the Postbaccalaureate Bylaw. Pet. App. 33a-36a.

The Third Circuit unanimously affirmed in relevant part, although it reinstated the Title IX claim. Pet. App. 1a-24a.[1] The court of appeals agreed that the Postbaccalaureate Bylaw did not fall within the scope of the Sherman Act because "the NCAA's eligibility rules [including the Postbaccalaureate Bylaw] * * * are not related to the NCAA's commercial or business activities." *Id.* at 10a-11a.

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[1] The district court had dismissed the Title IX claim on the ground that Title IX does not apply to the NCAA because it does not receive federal funding. Pet. App. 37a-42a. The Third Circuit, despite acknowledging that the NCAA itself receives no federal funds, reversed on the ground that the NCAA may be an indirect beneficiary of its member institutions' receipt of federal funding. *Id.* at 15a-19a. As the NCAA has demonstrated in its petition for a writ of certiorari in No. 98-84, the Third Circuit's Title IX holding is irreconcilable with *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), conflicts with decisions of other courts of appeals, and creates grave practical problems. The Court should grant certiorari to review the Third Circuit's Title IX holding. As is evident on the face of the present petition, however, there is no overlap at all between the Title IX issue and the antitrust issue petitioner raises, and thus no reason why the pendency of the NCAA's petition raising the Title IX issue should affect or delay the disposition of the present petition.

The Third Circuit also affirmed the dismissal on an alternative, independent basis. Assuming that the Sherman Act applied to the Postbaccalaureate Bylaw, the court of appeals held that the complaint failed to state a claim that the Bylaw violated the antitrust laws. Pet. App. 14a. The court of appeals concluded that, on its face, the Bylaw "clearly survives a rule of reason analysis" because it "is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive." *Ibid.* The Third Circuit held that the Bylaw plainly discouraged gamesmanship by graduate institutions and athletes alike by removing incentives to manipulate athletes' participation as undergraduates (and thus their eligibility) in order to "preserve [their] eligibility on a postbaccalaureate basis at another institution." *Ibid.*

ARGUMENT

The petition marshals three sets of reasons why petitioner's complaint allegedly should be evaluated under the rule of reason. But the Third Circuit *did* evaluate the complaint under the rule of reason (see Pet. App. 11a-14a), and the court of appeals held that the complaint failed to state a claim. Petitioner identifies no conflict among the circuits and provides no other justification for this Court to review the rule-of-reason holding, which fully and correctly disposes of petitioner's antitrust claim. Accordingly, it would be pointless to review the Third Circuit's alternative conclusion that the Postbaccalaureate Bylaw was not subject to the antitrust laws because it was "not related to the NCAA's commercial or business activities." *Id.* at 10a. In any event, the Third Circuit neither erred nor created a conflict among the courts of appeals when it placed the Bylaw beyond the scope of the antitrust laws. The petition should be denied.

1. Whatever the merits of petitioner's attacks on the Third Circuit's threshold determination that the antitrust laws do not apply to enrollment-based eligibility decisions, resolution of that issue would not affect the disposition of this case.

The court of appeals also held that the complaint failed to state a claim for relief under the antitrust laws. See Pet. App. 11a-14a. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). The judgment would be unaffected so long as the Third Circuit's holding under the rule of reason remained in place.

Yet the petition does not squarely challenge the Third Circuit's dispositive holding under the rule of reason, and offers no ground for this Court to review it. The third question presented in the petition asks only whether the rule of reason applies at all, Pet. i, but resolving that question in the affirmative — as petitioner seems to urge (see Pet. 27-29) — would not disturb the judgment below. The Third Circuit *applied* the rule of reason, and found petitioner's complaint wanting under that analysis. See Pet. App. 11a-14a.

Petitioner provides no legal authority to contradict the Third Circuit's rule-of-reason analysis, much less to show a conflict among the circuits. Petitioner does not question the Third Circuit's statement of the legal standard, but merely suggests in one paragraph that the NCAA could have achieved its goals in other ways. Pet. 29. At most, that objection amounts to a claim that the court of appeals "misappli[ed] * * * a properly stated rule of law," an inadequate ground for certiorari. S. Ct. R. 10.

In any event, the Third Circuit's analysis under the rule of reason was unquestionably correct in light of this Court's decision in *Board of Regents*. In that case, the Court recognized that "the NCAA plays a vital role in enabling college [athletics] to preserve [their] character, and as a result enables a product to be marketed which might otherwise be unavailable." 468 U.S. at 102. The Court defined that "product" as a "particular brand" of athletic competition "identifi[ed] * * * with an academic tradition." *Id.* at 101.

The Court was unanimous in recognizing the NCAA's eligibility requirements as procompetitive actions that furthered its "vital role." 468 U.S. at 102. The Court noted that "rules defining * * * the eligibility of participants" were among the "regulatory controls of the NCAA" that "are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." *Id.* at 117. The Court explicitly identified rules tied to athletes' enrollment status (such as the "require[ment] to attend class") as "procompetitive." In support of that statement, the Court prominently cited three district court cases that had upheld eligibility requirements and related sanctions under the rule of reason. *Id.* at 102 n.24 (citing *Justice* v. *NCAA*, 577 F. Supp. 356, 379-383 (D. Ariz. 1983); *Jones* v. *NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975); and *College Athletic Placement Service, Inc.* v. *NCAA*, 1975-1 Trade Cas. ¶ 60,117 (D.N.J), aff'd mem., 506 F.2d 1050 (3d Cir. 1974)). The dissenting opinion pointedly noted that no one "questions the validity * * * under the Rule of Reason" of NCAA rules that "pervasively regulated * * * student eligibility." *Id.* at 123 (White, J., dissenting).[2]

The message of *Board of Regents* — that the NCAA unquestionably "needs ample latitude to play" its "critical role" (468 U.S. at 120) — has been clearly understood by all of the courts of appeals that have evaluated NCAA eligibility requirements under the rule of reason. Like the Third Circuit in this case, other courts of appeals have affirmed Rule 12(b)(6) dismissals of antitrust challenges. The Fifth Circuit affirmed with "little difficulty" the dismissal of an antitrust challenge to the NCAA's rules limiting compensation to athletes. *McCormack* v. *NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988). Equally deficient, in the Seventh Circuit's view, was a complaint attacking the rules forbidding athletes to retain agents or enter

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[2] A leading commentator also has noted the competitive "virtues" of these rules. 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 432 (1986).

professional drafts. See *Banks* v. *NCAA*, 977 F.2d 1081, 1087-1094 (7th Cir. 1992).

Nothing in petitioner's complaint separates this case from the sound authority uniformly rejecting similar antitrust challenges to the NCAA's eligibility requirements. Petitioner, in fact, presents an even weaker case for antitrust condemnation of an NCAA eligibility rule than did the plaintiffs in *Banks* and *McCormack*. However weak their arguments may have been, those plaintiffs at least crossed the threshold of showing that the NCAA rules at issue precluded unfettered economic competition for the sale of athletes' services. The restriction in this case, by contrast, has nothing to do with economic benefits or economic competition, and its effect even on athletic competition (as opposed to individual competitors) was negligible. The restriction, moreover, is tightly linked to the identification of college sports with an *undergraduate* "academic tradition," *Board of Regents*, 468 U.S. at 101-102, and the NCAA's purpose of "provid[ing] an opportunity for competition among amateur students pursuing a *collegiate* education." *Banks*, 977 F.2d at 1090 (emphasis added). Given the total absence of any anticompetitive economic effect, the Third Circuit correctly determined that the NCAA's legitimate justifications for the Postbaccalaureate Bylaw would easily prevail in any rule-of-reason balancing.

The Third Circuit correctly observed (Pet. App. 11a n.4) that this case can readily be distinguished from *Law* v. *NCAA*, 134 F.3d 1010 (10th Cir. 1998), petition for cert. pending, No. 97-2004, which involved a salary restriction with potentially significant economic effects rather than an athlete eligibility rule. There is therefore no reason to hold this case pending disposition of the petition in *Law*, and indeed petitioner does not invoke *Law* in support of her position. Nevertheless, it is instructive to compare the decision below, where the court correctly understood *Board of Regents* to support the NCAA's broad latitude under the antitrust laws to regulate inputs to athletic competition, with *Law*, where the court misunderstood

Board of Regents so severely that it described a modest restraint on one input as "nearly identical" to the direct output limitation condemned in *Board of Regents*. 134 F.3d at 1020. The two recent decisions, taken together, demonstrate that, after 14 years, this Court's *Board of Regents* decision requires further clarification. For the reasons stated in the NCAA's petition for a writ of certiorari in *Law*, that case is an appropriate vehicle for the necessary clarification. This case is not.

2. The Third Circuit's alternative and independent determination that the Sherman Act does not apply to non-economic eligibility rules such as the Postbaccalaureate Bylaw provides no sounder basis than its rule-of-reason holding for this Court's review of this case. That determination, too, does not conflict with the holding of any other court of appeals.

The Third Circuit correctly observed that "no court of appeals expressly has addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules." Pet. App. 10a. Petitioner's contrary assertion cannot withstand scrutiny.

Petitioner claims (Pet. 14) that the alternative holding below conflicts with the decision of the Fifth Circuit in *McCormack*, 845 F.2d 1338. But the Fifth Circuit explicitly declined to decide whether the antitrust laws applied to the NCAA's eligibility rules. *Id.* at 1343. Like the Third Circuit (see Pet. App. 11a-14a), however, the Fifth Circuit "[a]ssum[ed] * * * that the antitrust laws apply to the eligibility rules" and affirmed a dismissal under Rule 12(b)(6) for failure to state an antitrust claim. 845 F.2d at 1343.

Likewise, the Third Circuit's view of the scope of the Sherman Act does not conflict with *Hairston* v. *Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996). See Pet. 11-12. The antitrust claim in *Hairston* challenged *sanctions* that reduced a college's revenues from bowl games and television, not the recruiting rules that the college violated. See 101 F.3d at 1317. The Ninth Circuit rejected that claim on the merits. The

economic impact of the sanctions on the university was patent, whereas petitioner here offers only attenuated and non-antitrust-related theories of how the application of eligibility rules to her had any economic impact (Pet. 19-20 & n.4). She resorts to arguing that intercollegiate athletics "taken as a whole * * * has a very substantial impact on interstate commerce" (*id.* at 18), which of course is true, but it hardly follows that the antitrust laws were meant to regulate eligibility rules without any substantial commercial character. In any event, eligibility rules simply were not at issue in *Hairston*, and the NCAA prevailed on the challenges to the rules and sanctions that were at issue.

In this case, the Third Circuit correctly adhered to this Court's textually rooted assertions that the Sherman Act regulates only conduct that may restrain *trade*, *i.e.*, conduct that is commercial in nature and economic in effect. See Pet. App. 8a-9a; cf. 15 U.S.C. § 1. The antitrust laws condemn "restraints to * * * competition in *business and commercial transactions.*" Pet. App. 9a (emphasis added) (quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 492-493 (1940)). Courts of appeals have recognized that the antitrust laws do not extend to the *non*commercial actions of nonprofit organizations. *United States* v. *Brown Univ.*, 5 F.3d 658, 665-666 (3d Cir. 1993); *Marjorie Webster Junior College* v. *Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 653-655 (D.C. Cir. 1970). See 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 262a, at 269-271 (rev. ed. 1997).

Moreover, contrary to petitioner's contention (Pet. 9-11), the Third Circuit's view draws *support* from *Board of Regents*. This Court reiterated that the Sherman Act is "a comprehensive charter of *economic* liberty" that preserves competition as a "rule of *trade*." 468 U.S. at 104 n.27 (emphasis added) (quoting *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958)); see *id.* at 133 (White, J., dissenting) (Sherman Act is aimed at conduct having "commercial objectives"). *Board of Regents* involved only *price* and *output* restrictions on television

broadcasts of the *output* of intercollegiate athletic contests — not a *non-economic* limit on the eligibility of athletes to participate as *inputs* to those contests. The Court repeatedly drew these distinctions. See 468 U.S. at 101-103, 117-119.

In making the contrary argument, petitioner misrepresents this Court's opinion in *Board of Regents*. Petitioner asserts that the Court *silently* "approve[d] the Sherman Act's applicability" to *all* "NCAA bylaws." Pet. 9-10 (citing 468 U.S. at 102 & n.24). In fact, however, this Court simply emphasized the *pro*competitive aspects of the NCAA's eligibility rules; in footnote 24, without further comment, the Court cited three district court decisions holding that the rules were indeed procompetitive. *None* of those decisions held that the Sherman Act applied to eligibility rules, but *two* of them held that it did *not* apply. See *Jones*, 392 F. Supp. at 303; *College Athletic Placement*, 1975–1 Trade Cases ¶ 60,117, at 65,267.

Even if the Sherman Act might apply to some eligibility rules, the Postbaccalaureate Bylaw is especially devoid of commercial or economic character.[3] The NCAA's determination to draw the limits on post-graduate eligibility where it did does not affect the compensation of athletes or their ability to seek future compensation without forfeiting current eligibility. The Third Circuit correctly concluded that the Bylaw was too distantly related to "trade or commerce" to constitute a "restraint of trade or commerce" within the meaning of the Sherman Act. 15 U.S.C. § 1.

3. The bulk of the petition (Pet. 16-27), loosely linked to the second question, advances a mélange of additional arguments challenging the Third Circuit's determination that the

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[3] Petitioner's attempt to separate the Sherman Act from its commercial and economic moorings is plainly misguided. If her view were law, illiterate students could assert antitrust claims against colleges that, through their association with accrediting authorities, agreed to admit and graduate only students who could read and write — a restriction that, like the Bylaw challenged here, would deny a privilege based on a collective determination.

Bylaw was not subject to antitrust scrutiny. Those broad discussions address topics covered tangentially or not at all in the decision below. The court of appeals held only that the specific *action* of the NCAA that petitioner challenged was not a restraint of trade within the scope of the antitrust laws and did not violate those laws even if it *was* within their scope. The court did not pass on petitioner's standing or the nature of her injury, and did not dispute that the NCAA acts in interstate commerce. "The question which we now face is different; it is whether antitrust laws apply only to the alleged infringer's commercial activities." Pet. App. 8a. Because petitioner's second question is not germane to the judgment below, it does not present any issue that this Court *could* review.

4. Finally, this case is a poor vehicle for this Court's review of *any* antitrust issue. This is essentially a case of first impression: neither the parties nor the court of appeals could identify "any opinion addressing" the validity under the rule of reason of the "particular bylaw at issue here." Pet. App. 13a. And the resolution of the validity of the superseded Post-baccalaureate Bylaw would have no practical effect; as petitioner admits (at 12, 29), the Bylaw that she challenged has been amended to her liking.[4]

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[4] The amendment of the Bylaw in no way alleviates the need for plenary review of the question whether the Third Circuit properly held that the NCAA is subject to Title IX. See note 1, *supra*. That ruling rested entirely on the Third Circuit's flawed conclusion that, because the NCAA receives dues from member institutions that in turn receive federal funds, the NCAA itself is a federal funding recipient within the terms of Title IX. The Third Circuit's ruling with respect to the coverage of Title IX is by no means limited to or by the specific bylaw at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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